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In The

Supreme Court of the United States

October Term, 1936

No. 958

STANDARD ACCIDENT INSURANCE COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA for the use and benefit of L. R. POWELL, JR., *and* HENRY W. ANDERSON, as Receivers of the SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

The statement of the case or matter involved contained in the petition is deemed sufficient.

ARGUMENT

The sole question presented to the courts below and answered by them affirmatively is this:

Are freight charges of a railway company for transporting materials used in the prosecution of the work provided for in the United States construction contract, incurred by the contractor for such work, within the obligation of a bond conditioned, conformably to the statute cited in the petition, for the "payment to all per-

sons supplying the principal with labor and materials in the prosecution of the work"?

It is admitted that the decision which the petitioner seeks to have reviewed is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Mandel, et al., vs. U. S., to use of Wharton and N. R. Co., et al,* (March 19, 1925) 4 Fed. (2d), 629, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Title Guaranty & Trust Co. vs. Puget Sound Engine Works, et al,* (June 10, 1908) 163 Fed., 168; 89 C. C. A., 618. The Third Circuit Court cites as authority for its holding, in the former, the case of *U. S. vs. Hyatt,* 92 Fed., 445; 34 C.C.A., 447, decided by the Circuit Court of Appeals for the Fifth Circuit in 1899 and now expressly overruled by that court in its decision which petitioner seeks to have reviewed. And that is the only authority cited (Text 631). The Ninth Circuit Court cites no authority for its holding in the latter except *dicta* in the opinion in *American Surety Company vs. Lawrenceville Cement Company, et al* (C.C.) 110 Fed., 717. (Text 178).

As pointed out by the Circuit Court of Appeals for the Fifth Circuit in its opinion in the case of *City of Stuart, to Use of Florida East Coast R. Co., vs. American Surety Co. of New York,* 38 Fed. (2d) 193, as well as in its opinion in the case which petitioner seeks to have reviewed, this Court has rejected the theory of strict construction of the statute and bonds executed in pursuance thereof, urged by petitioner in the courts below, and adopted that of a broad and liberal construction of the same. It is upon such principle that the Circuit Court of Appeals for the Fifth Circuit expressly bases its decision of which the petitioner complains. The case in this Court of *Brogan vs. National Surety Co.,* 246 U.S.,

257; 38 S. Ct. 250; 62 L. Ed., 703, (cited by the Circuit Court of Appeals for the Fifth Circuit) cites and discusses the other two cases cited by that court. We particularly direct the Court's attention to the following excerpt from its opinion in that case:

> "In *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 61 L. Ed., 1206, 37 Sup. Ct. Rep. 614, recovery was allowed not only for the rental of cars, track, and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment, and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work."

And to this excerpt from the opinion of the Circuit Court of Appeals for the Fifth Circuit in the case of *City of Stuart, etc. v. American Surety Co., supra*;

> "Transportation of materials by cart and towboat is uniformly allowed as labor. *United States Fidelity & Guaranty Co. v. United States,* 231 U. S., 237, 34 S. Ct. 88, 58 L. Ed., 200; *Title Guaranty & Trust Co. v. Crane Co.,* 219 U. S. at page 34, 31 S. Ct. 140, 55 L. Ed., 72. In what way can the distance of the transportation or the fact that it is over a specially prepared rail track make it any the less labor? It was held in *Illinois Surety Co. v. John Davis Co.,* 244 U. S. 376, 37 S. Ct. 614, 61 L. Ed., 1206, that, where track and cars and equipment were rented by the contractor, and used by him in transportation for the job, the rental was protected by the bond. If he should charter a railroad or a train, the railroad company could, under this decision, recover. Why not when it furnishes single cars? By all the cases, when a furnisher of material pays the freight, whether bound to do so or because the con-

tractor does not pay, the freight is added to the cost of the material; and protected. See *Maryland Casualty Co. v. Ohio River Gravel Co.* (C.C.A.) 20 F. (2d) 514. The same 'place value' is given the material by the transportation, no matter who pays the freight, and to the same extent is material furnished."

CONCLUSION

We respectfully submit that the question involved has already, in effect, been decided by this Court even though a claim by a railway company for such freight charges as were before the courts below and under a bond such as the one before the courts below has not been before it for allowance, and that, upon the principle established by this Court in the cases above cited, the petition for a writ of certiorari should be denied.

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